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No. 91-948

In The

Supreme Court of the United States

October Term, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC. AND ERNEST PICHARDO,

Petitioners,

V.

CITY OF HIALEAH,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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STATEMENT OF AMICUS CURIAE[1]

This case is about the prevention of invidious discrimination against smaller or more unpopular religious groups. The Framers of the United States Constitution never intended the First Amendment Religion Clauses to be used as a tool to eliminate minority religious groups. Indeed, the First Amendment was created expressly with the idea of insulating these minority groups from governmental regulation and censorship. If the decision below is not reversed by this Court, it will significantly weaken the consideration and caution that the judiciary has historically shown to religious minorities. This

[1] This brief is filed with permission of all the parties. Blanket consents have been filed with the Clerk of this Court.

case could mean the destruction of the freedom of religious persons to worship privately as society now knows it.

Amicus curiae is a non-profit religious corporation named for Samuel Rutherford, a 17th-century Scottish divine and Rector at St. Andrew's University. With thirty-one state chapters, three international chapters, and an international headquarters in Charlottesville, Virginia, *amicus curiae* assists litigants and participates in significant cases relating to the freedom of speech of religious persons. Counsel for *amicus curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amicus curiae* in numerous cases before this Court. *Amicus curiae* believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

Amicus does not believe that *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), and its "generally applicable, facially religion-neutral" formulation controls this case. An approach where the judiciary substantially defers to the elected branches of government is "highly threatening to free exercise concerns, especially where members of small, unpopular, or unconventional religions are involved."[2] *Smith* does not unambiguously represent this Court's definitive adoption of a complete reordering of a body of law that took forty years to develop. Moreover, the demonstrated interests by the Justices of the Court in First Amendment history, solicitude for the role of religion as a mediating institution in culture, fidelity to constitutional text, alertness to how purported "neutrality" can mask hostility, and the conservative instinct to proceed cautiously on a case-by-case basis[3] all weigh in against the brash assumption that *Smith* is controlling here.

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[2] Mary Ann Glendon, *Religion & the Court: A New Beginning?*, First Things 21, 24 (March 1992).

[3] *Id.* at 25.

The Establishment Clause should not be ignored in this matter, for it prohibits not only discrimination *among* religious groups, but also prevents the political branches of government from invidious discrimination *against* unpopular religious groups and their religious practices.

ARGUMENT

I.

ALTHOUGH THE *SMITH* CASE CHANGES THE *SHERBERT*-APPROACH, IT MOST CERTAINLY DOES NOT SUPPLANT THE COMPELLING INTEREST TEST ALTOGETHER.

A. A MUNICIPAL ORDINANCE THAT EXPRESSLY BARS THE RITUAL SLAUGHTER OR SACRIFICE OF ANIMALS IS NOT FACIALLY NEUTRAL AS TO RELIGION.

After making the point that religious *belief* is absolutely protected, the Supreme Court in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), turned to the far more common area of disputes concerning the scope of protection for religious *practices*. 494 U.S. at 877. This Court said that legislation would fail the facial-neutrality requirement and thus would merit strict scrutiny if the law prescribed (or proscribed) certain physical acts "only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id. Accord Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (discussed *infra* at footnote 11 and accompanying text). For example, said the Court, "[i]t would doubtless be unconstitutional . . . to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf." 494 U.S. At 877-878.[4]

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[4] This Court's entire passage reads as follows:

Under this test a law that expressly criminalizes "the consumption of wine" would be constitutional, whereas legislation that prohibits "the sacramental consumption of wine" would be closely examined by the Court under the compelling interest test. Likewise, a municipal ordinance that by its terms prohibits "the slaughter of domestic animals" need only survive rational-basis review, whereas legislation that punishes "the sacrificial slaughter of domestic animals" would receive strict scrutiny in the courts.

Two of the ordinances chailenged in this case, *Ord.* 87-71 and *Ord.* 87-52, expressly subject a religious ritual to discriminatory treatment. Moreover, Ord. 87-40 enacts Fla. Stat. Ann. ch. 828 as a City ordinance. Sec. 828.12(1) (Supp. 1991), makes it a misdemeanor to "unnecessarily" kill an animal. The City obtained an opinion of the Florida Attorney General to the effect that "unnecessary" killings includes the religious sacrifice of animals. Finally, all four ordinances were enacted for the purpose of suppressing Petitioners' religion, as evidenced by the accompanying resolutions[5] and the findings below. For example, the District Court found that these ordinances were

> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstention only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Smith, 494 U.S. at 877-878.

[5] The first ordinance, passed as an emergency ordinance, adopted the language of Fla. Stat. 828.02-.25, the Florida anti-cruelty statute, and established penalties for its violation. Hialeah, Fla., Ordinance 87-40 (June 9, 1987). The second ordinance prohibited the possession of animals intended for slaughter or sacrifice. It excepted any licensed establishments slaughtering animals for food purposes where such activity is properly zoned and otherwise permitted by state and local law. Hialeah, Fla., Ordinance 87-52 (Sept. 8, 1987). The third ordinance prohibited animal sacrifice within Hialeah city limits and empowered registered groups to investigate and assist in the prosecution of individuals or groups violating the ordinance. Hialeah, Fla., Ordinance 87-71 (Sept. 22, 1987). The fourth ordinance prohibited the slaughter of animals on any premises within the City of Hialeah, except those properly zoned as slaughterhouses, and empowered registered groups to investigate and assist in the prosecution of individuals or groups violating the ordinance. Hialeah, Fla., Ordinance 87-72 (Sept. 22, 1987).

The City also passed three resolutions concerning animal sacrifice and religious practices in general. The first resolution reiterated the City's "commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Hialeah, Fla., Resolution 87-66 (June 9, 1987). The second resolution established the City's policy opposing the ritual sacrifice of animals and stated the City's intent to prosecute any individual or organization engaging in that practice. Hialeah, Fla., Resolution 87-90 (Aug. 11, 1987). The third resolution set forth the criteria for approval of animal protection associations seeking to register with the City in order "to participate in the investigation and assist in the prosecution of violations of the animal cruelty ordinances." Hialeah, Fla., Resolution 87-109 (Sept. 22, 1987).

(The foregoing was taken from Comment, 45 U. of Miami L. Rev. 1061, 1090 n.239 (1991).)

"prompted by the Church's public announcement that it intended to come out into the open and practice its religious rituals," and that "the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 723 F. Supp. 1467, 1479 (S.D. Fla. 1989).

In light of this Court's own reasoning in *Smith*, there is no escaping the conclusion that the lower courts erred in the manner by which they applied the standard of review to the City of Hialeah ordinances that expressly take aim at a religious practice.

B. *SMITH* IS DISTINGUISHABLE ON ITS FACTS AND ON THE BASIS OF THIS COURT'S PRECEDENT.

The City of Hialeah places considerable reliance on *Employment Division v. Smith* and its application of a rational-basis standard of review where the legislation under examination is generally applicable, and facially religion-neutral. The City cites the teachings of *Smith* as if its rule of decision arose *ex nihilo*. Like any complex area of constitutional law, a single case cannot be torn from its larger context.

It is a mistake to believe that *Smith* controls this case. In *Smith*, Justice Scalia traced, *inter alia*, the "generally applicable, facially religion-neutral" standard for assessing a statute under the Free Exercise Clause, to Chief Justice Burger's plurality opinion in *Bowen v. Roy*, 476 U.S. 693, 701-12 (1986)("Part III" of the opinion, joined by Powell and Rehnquist, JJ.). In turn, the issue that divided the Court in *Roy*, most evident in the exchange between the Chief Justice and Justice O'Connor, 476 U.S. at 724-33 (concurring in part and dissenting in part, joined by Brennan and Marshall, JJ.), is a direct descendent of a dispute between Justice Frankfurter and Justice Brennan that surfaced back in the early 1960's in the case of *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion).[6] Although dissenting in *Braunfeld*, two years later Justice Brennan eventually prevailed over Frankfurter when Brennen wrote the majority opinion in *Sherbert v. Verner*, 374 U.S. 398 (1963).

Until recently the conventional wisdom had it that *Sherbert* was the foundational case that gave rise to modern doctrinal

[6] Indeed, the dispute has an even more ancient origin in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). Writing for the majority in *Gobitis*, Frankfurter held that children of Jehovah's Witnesses could be expelled from public school for refusal to salute the U.S. flag. *Gobitis* was expressly overruled in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Justice Frankfurter dissented in *Barnette*, *id.* at 653-655, arguing that a generally applicable, facially religion-neutral regulation was constitutional.

analysis under the Free Exercise Clause. Although *Smith* changes the *Sherbert*-approach, it most certainly does not supplant the compelling interest test altogether. A brief overview of the evolution of Free Exercise Clause doctrine will provide a helpful perspective.

1. The Evolution of Modern Free Exercise Clause Doctrine.

In *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Supreme Court first acknowledged that the liberty protected by the Free Exercise Clause of the First Amendment is a "fundamental" right, and thus properly binding on state and local governments through the Due Process Clause of the Fourteenth Amendment. Hence, religious freedom was one of the first provisions of the Bill of Rights to be "incorporated" or "absorbed" as an essential liberty into the Due Process Clause of the Fourteenth.

Free Exercise Clause cases in the 1940's and 1950's witnessed the continuation of a bifurcation, first made in the nineteenth century Mormon Cases,[7] between religious belief and religious practice. Religious belief was protected absolutely by the First Amendment. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)(upholding right of Jehovah's Witness children to not salute the U.S. flag or recite Pledge of Allegiance); *United States v. Ballard*, 322 U.S. 78 (1944)(trial for criminal fraud could not call into question the falsity of religious representations; only sincerity of the accused properly before trier of fact).[8] But in the nature of things, said the Court, religious practices could not be left unchecked in the

[7] *Davis v. Beason*, 133 U.S. 333, 342-43 (1890); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878).

[8] For later cases to the same effect, *see Torcaso v. Watkins*, 367 U.S. 488 (1961)(no religious oath could be required for holding public office); *Wooley v. Maynard*, 430 U.S. 705 (1977)(upholding Jehovah's Witnesses right to cover up the New Hampshire state motto "Live Free or Die" on car license plate).

face of a strong interest in the protection of society. *Prince v. Massachusetts*, 321 U.S. 158 (1944)(upholding criminal conviction of Jehovah's Witness for violating child labor law); *cf. Cantwell*, 310 U.S. at 304-11 (overturning criminal conviction of Jehovah's Witness for inciting a breach of the peace).

By the end of the 1950's, then, the Free Exercise Clause protected religious belief absolutely. In contrast, the practice of religion was subject to regulation, but only upon a showing that something akin to the "evils most appropriate for such action [as] the crippling effects of child employment" was involved, *Prince*, 321 U.S. at 168, or a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order," *Cantwell*, 310 U.S. at 308.

In 1961 the Supreme Court heard consolidated cases raising several claims concerning the constitutionality of Sunday-closing legislation. *Braunfeld v. Brown, supra*, 366 U.S. 599,[9] presented the issue of whether a Pennsylvania Sunday-closing law interfered with the Free Exercise Clause right of a practicing member of the Orthodox Jewish faith. As a Sabbatarian whose religion prevented the operation of his retail business from sundown Friday until sundown Saturday, Mr. Braunfeld desired to be open for business on Sunday. This option the law denied, to the claimant's substantial economic loss and to the incidental benefit of his non-Sabbatarian competitors.

By a 5 to 4 split, the Supreme Court upheld the state law. In the plurality opinion by Chief Justice Warren, and in the concurring opinion of Justice Frankfurter, joined by Justice Harlan, it was said that the Free Exercise Clause gave no relief because the religious burden was "indirect" or "incidental." *Id.*

[9] Decided along with *Braunfeld* was *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); and *Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617 (1961).

at 606 (Warren, C.J.); *id.* at 459, 521-22 (separate opinion by Frankfurter, J.). By "indirect," the Justices did not mean that the burden was insubstantial. Indeed, it was stipulated that if Mr. Braunfeld remained closed on Saturday and was prevented from opening on Sunday, then he would be "unable to continue in his business, thereby losing his capital investment." *Id.* at 521, 601. Rather, by an "indirect" burden the Justices meant that Mr. Braunfeld did not face an unavoidable choice between following the dictates of his faith, thereby breaking the law, or obeying the state law, thereby transgressing against God's commandment. Because Mr. Braunfeld could obey both the commands of law and faith by being closed the entire weekend, albeit with the financial loss of going out of business, he faced no "direct" religious burden.[10] Absent an unavoidable choice between the command of the law and the command of faith, the Court held that Mr. Braunfeld did not state a *prima facie* case under the Free Exercise Clause.

The Court hastened to say that there was no allegation in the case that Pennsylvania had enacted the Sunday-closing law with the discriminatory intent of harming Sabbatarians in general, or observant Jews in particular. *Id.* at 607.[11] If Jews had been targeted for disapproval it would have been a different case. *See* Point I. A. *supra*.

The rule of *Braunfeld*, then, was that when the statute in question is generally applicable and facially religion-neutral, the

[10] Put very simply, a "direct" burden is government action that forbids or compels certain behavior. An "indirect" burden merely makes noncompliance with the law more difficult or expensive.

[11] [T]o hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be . . . only indirect.

Braunfeld, 366 U.S. at 607.

Free Exercise Clause is not violated — BUT ONLY so long as the religious burden is "indirect" (*i.e.*, there is a path whereby the dictates of both law and faith can be obeyed) and there is no evidence of discriminatory animus. Although perhaps getting ahead of ourselves, in the present case the burden is "direct" because a Santeria's choice is unavoidable between obeying the City's ordinances or proceeding with the ritual of animal sacrifice.

In *Braunfeld*, Justice Brennan dissented on the Free Exercise Clause issue. *Id.* at 610. Two years later, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the rationale of that dissent became the majority rule. In *Sherbert*, a Seventh-day Adventist was discharged by her employer because she would not work on Saturday, a practice proscribed by the tenets of her church. When she applied for unemployment compensation pursuant to the South Carolina Unemployment Compensation Act, benefits were denied. The state Employment Security Commission found that the claimant's refusal to work on Saturday brought her within the statutory provision disqualifying workers who fail, without good cause, to accept "suitable work when offered . . . by the employment office or the employer." *Id.* at 401.

Writing for the Court, Justice Brennan reversed the decision below and held that under the Free Exercise Clause unemployment compensation could not be denied. In so holding, *Sherbert* gave rise to two key principles. **First**, that "indirect" as well as "direct" burdens on religious practices were actionable under the Free Exercise Clause. Accordingly, although Ms. Sherbert did not face an unavoidable choice because it was possible for her to keep Saturday as her day of rest and still not violate any law — albeit, she would lose her unemployment benefits — even this "cruel choice" violated free exercise. **Second**, after *Sherbert* it did not matter that the nature of the "indirect" burden is loss of a welfare entitlement payment, as

contrasted with a prohibitive law such as "do not open your retail store on Sunday upon pain of a civil fine."[12]

Justice Harlan, who had joined Justice Frankfurter's opinion in *Braunfeld*, dissented in *Sherbert* pointing out the inconsistency in the two cases. *Id.* at 421.

Although resistance to these two significant developments in *Sherbert* surfaced in dissenting opinions of the Supreme Court throughout the 1970's and 1980's, the *Sherbert*-approach continued to command a majority. Moreover, *Sherbert* was widely supported by legal commentators. With that in mind, as we entered the 1990's *Sherbert* was regarded as the fountainhead for the modern, three-step Free Exercise Clause test:

> 1. The claimant must show that he or she is SINCERE in wanting to conform to the religious practice in question.
>
> 2. The claimant must show that the government's law poses a "cruel choice," *i.e.*, it places more than a *de minimus* BURDEN, direct or indirect, on the religious practice in question.
>
> 3. If points 1 and 2 are satisfied, the claimant has established a *prima facie* case and will prevail, unless

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[12] As to this second development, moreover, the Supreme Court in *Sherbert* had to turn back the inevitable argument that requiring payment of an entitlement benefit to a religious dissenter under circumstances where non-Sabbatatians would be denied the welfare benefit, has the effect of establishing a religion. It is one thing to lift a legal prohibition from the religious dissenter, but quite another, argued South Carolina, to require payment of a monetary benefit not available to non-Sabbatatians who are otherwise similarly situated. *Id.* at 409-10. Although dissenting on the Free Exercise Clause issue, Justice Harlan agreed with the majority in *Sherbert* that there would be no Establishment Clause violation if a state chose to statutorily exempt Sabbatarians. *Id.* at 422. It is now clear that legislative exemptions designed to allow freer religious exercise do not violate the Establishment Clause. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Smith*, 494 U.S. at 890.

> the government can meet its burden of producing evidence that: (a) the societal interest in applying the law to the claimant is COMPELLING; and, (b) the government cannot achieve the same societal interest by means LESS RESTRICTIVE to the claimant's religious practice.

Concerning any doubt as to the rigor of the burden of production that must be satisfied by the state once the claimant has made out a *prima facie* case, the Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), quoting from *Sherbert*, held that the state interests found sufficient to override religious exercise "have invariably posed some substantial threat to public safety, peace or order." *Id.* at 230. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

Throughout the 1980's, the compelling interest test was "Black Letter Law." In *Thomas v. Review Board*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); and *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989), the state could not satisfy the compelling interest test. In *United States v. Lee*, 455 U.S. 252 (1982), the Court found a compelling interest. In *Roy*, 476 U.S. at 699-701, and *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990), it was not necessary to find a compelling interest because the claimant failed initially to show religious burden. Indeed, until *Smith*, in only three modern cases has the Supreme Court not applied the compelling interest standard. Two of these cases involved special environments, *O'Lone v. Shabazz*, 482 U.S. 342 (1987) (penitentiary); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (armed forces); and in *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988), the claim turned on the government's right to manage its own land.

As stated above, the *Sherbert*-approach was questioned by three Justices in *Roy*, 476 U.S. at 701-12 (plurality opinion of Burger, C.J.), compare *id.* at 724-33 (O'Connor, J., concurring in part and dissenting in part), reaffirmed by a six-judge majority in *Hobbie*, 480 U.S. 136, 141-43 (1987), compare *id.* at 147 (concurring opinion by Powell, J.), reaffirmed in *Frazee*, 489 U.S. 829 (1989), and reaffirmed again in *Swaggart Ministries*, 493 U.S. 378 (1990).

The City of Hialeah is right to identify *Smith* as a significant case that must be taken into account. But the City is WRONG concerning what *Smith* does to modify the doctrinal approach under the Free Exercise Clause. In *Smith*, for the first time, a majority of five justices held that statutory entitlement benefits may be denied if the legislation in question is generally applicable and facially neutral as to religion.[13] *Smith* was an unemployment compensation benefit case, and thus it must be conceded that it reverses the second key principle of *Sherbert* in this regard.[14] *Smith* also changes the first key principle established in *Sherbert*, namely that the religious burden may be "indirect." Accordingly, the Court in *Smith* has reverted to

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[13] The principled difference between denying a statutory benefit and lifting the burden of a prohibitive law was stated in the separate opinion of Justice Douglas in *Sherbert*:

> The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

374 U.S. at 412.

[14] *Smith's* denial of Free Exercise Clause protection for entitlement benefits can also be justified on the basis that the injury to the claimant is "economic" as opposed to "spiritual." Although the Establishment Clause protects against economic and political harms, it has long been thought that the Free Exercise Clause only protects against injury to religious-based conscience. *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961).

Braunfeld for its Free Exercise Clause approach. BUT even *Braunfeld* (Warren, C.J.; Black, Clark, Whittaker, Frankfurter & Harlan, J.J.) finds the Free Exercise Clause violated when the religious burden is "direct."

The City of Hialeah argues for a reading of *Smith* that would require of government only that its legislation be "religion blind." Even Justice Harlan, who sided with Warren and Frankfurter in *Braunfeld*, and dissented in *Sherbert*, rejected that contention. *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting) (rejecting such a thesis in a publication by Professor Kurland). *See* L. Pfeiffer, *Religion-Blind Government*, 15 Stan. L. Rev. 389 (1963) (showing the unworkability of a religion-blind thesis and its wholesale overruling of settled law, both state and federal).

Turning to the issues presently before this Court, the Santerias are faced with: (1) a "direct" burden, one from which there is no path of avoidance; and, (2) incurring the penalty of a prohibitive law, not mere cutoff of social welfare entitlement payments. In *Smith*, compliance was possible because the religious claimants faced only a "cruel choice," (give up their unemployment benefits or give up peyote) not an unavoidable choice between obeying Caesar or God.

In instances where the choice is unavoidable, such as this case, the "direct" burden on religious practice will confront a claimant with a situation calling for an act of civil disobedience. Disobedience for the sake of conscience, in turn, leads to infamous trials that pit the Sovereign in a clash with religious obedience to a believed Higher Power — engendering social division of a far graver kind. Such head-on clashes of the Sacred with the Sovereign are worth the price only when societal interests of the highest order are clearly at risk: for instance, saving the life of a critically injured child by administering a blood transfusion, even when the parents for reasons of faith will

only minister prayer. This Court does not, in the case *sub judice*, have at risk societal interests of that high order.

2. The City's Reading of *Smith* is Contrary to Both Text and History.

The very text of the First Amendment is not facially neutral as to religion.[15] Rather, the text places special value on religion, just as it values free speech and free press.

Exhaustive scholarship into the original meaning of the Free Exercise Clause was released soon after the decision in *Smith*. *See* M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). Professor McConnell demonstrates that statesmen in the founding generation considered exemptions from facially neutral legislation to be free exercise of religion, and they expected this right to be enforced by the courts. At least where the burden is "direct," as it is on the Santerias, history tells us that the Free Exercise Clause is violated.

To read the *Smith* case as permitting generally applicable, facially religion-neutral legislation to apply to "direct" burdens on religious practice, is to attribute to this Court a wholesale overruling of its own precedent. For example, the City's reading of *Smith* would *sub silentio* overrule the following: *Yoder*, 406 U.S. 205 (1972) (state compulsory school-attendance law violates free exercise of Amish); *Barnette*, 319 U.S. 624 (1943) (state regulation requiring salute to U.S. flag and reciting pledge of allegiance by all public school pupils violates freedom of belief of Jehovah's Witnesses); *Cantwell*, 310 U.S. 296 (1940) (statutory and common law offenses of inciting breach of the peace and barring charitable solicitation without permit violates free exercise and free speech of Jehovah's Witness); and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state statute requiring

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[15] *See Welsh v. United States*, 398 U.S. 333, 372 (1970) (White, J., dissenting) ("It cannot be ignored that the First Amendment itself contains a religious classification.").

attendance at public school, thereby effectively closing parochial schools, violative of substantive due process rights of parents to direct the upbringing of their children, including choice of religious-based primary and secondary education).

On the other hand, should the City argue that *Smith* does not overrule the above-list of established precedent, but simply marginalizes them as "hybrid" cases, then *Amicus* submits that this case is such a "hybrid" situation. *Smith*, 494 U.S. at 882. Point III which follows, argues that the application of the ordinance violates the Church's First Amendment rights under the Establishment Clause.

Of course, there is a serious problem with trying to explain away every relevant precedent as a "hybrid" case. To read *Smith* as merely affording redundant protection to religious speech, religious association, the no-establishment provision, or parental rights, would strip the Free Exercise Clause of any independent force. Such a consequence has a serious textual flaw, for it would leave a major clause in the Bill of Rights without meaning apart from other clauses. Surely this is a clear signal that the City is advancing a mistaken reading as to the scope of the *Smith* case.

II.

THE COMPELLING INTEREST TEST DOES NOT CAUSE A CIVIL MAGISTRATE TO BECOME INVOLVED IN ASSESSING THE "CENTRALITY" OF A RELIGIOUS PRACTICE.

In *Employment Division v. Smith*, 494 U.S. at 886-887., this Court correctly reaffirmed that the First Amendment prohibits a civil magistrate from engaging in a "centrality" test.[16] Performing a "centrality" test requires an assessment of

[16] Lifting language out of *Wisconsin v. Yoder*, the government in *United States v. Lee*, 455 U.S. at 257, argued that a free exercise claimant had to show that the belief giving rise to the desired religious practice was essential to, or

the importance of a given doctrine to the religion in question, or assessing the harm that would befall a religious claimant if he or she had to comply with the legislation in question. *Accord* 494 U.S. at 906-907 (O'Connor, J., concurring) ("our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue").

Amicus is in complete agreement that the First Amendment prohibits a "centrality" test. However, the proper administration of the compelling interest standard of review does not entail a civil court's engagement in the prohibited "centrality" test.

In order to establish a *prima facie* case, two things must be shown: (1) that the claimant is sincere in wanting to conform to the religious practice in question; and, (2) the government's legislation places a "direct" burden on the religious practice. If points (1) and (2) are satisfied, then the claimant will prevail *unless* the government can meet its burden of producing evidence that: (a) the societal interest in applying the legislation to the claimant is compelling; and, (b) the government cannot achieve the same societal interest by means less restrictive to the claimant's religious practice.

In marshalling the evidence to meet this burden, the government is to offer facts and argument which tend to prove that important objectives (*e.g.*, public health and safety; prevention of fraud) cannot be achieved if case-by-case exemptions are to be granted to religious claimants such as the one before the

"threaten the integrity of," the claimant's church doctrine or belief-system. This "centrality" argument the *Lee* Court rebuffed with this rationale:

> It is not within "the judicial function and judicial competence," however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; "[c]ourts are not arbiters of scriptural interpretation."

Id. (quoting *Thomas*).

court. This is indeed a difficult burden, as rightly befits a liberty engraved in the text of the First Amendment.

This evidence and argument does NOT weigh the importance of the particular religious practice in question to a church's overall doctrine, nor does it assess the "spiritual harm" to a claimant should he or she have to obey the law rather than the commands of faith. Accordingly, this is NOT a "balancing" test weighing the interests of the claimant against those of the government, and it is a misnomer to call it such. The only assessment by a civil magistrate is the importance of the law's administration without any exception for the claimant.

Accordingly, in the case at bar the evidence and argument by the City of Hialeah should address, for example, the importance of its ordinances to preventing the spread of disease and/or the desirability of preventing cruelty toward domestic animals. In applying the compelling interest test, there is no need for an examination by a civil magistrate into the importance of ritual sacrifice to the Church of the Lukumi Babalu Aye, Inc., or its followers.

III.

THE CITY'S ORDINANCES HAVE AN INVIDIOUS RELIGIOUS PURPOSE VIOLATIVE OF THE ESTABLISHMENT CLAUSE.

Two of the City's ordinances expressly single-out a religious practice for unfavorable treatment, a third is discriminatory as construed by the state attorney general, and all four ordinances were adopted in an environment openly hostile to Petitioners. *See* footnote 5 *supra* and accompanying text. As interpreted by this Court, the Establishment Clause prohibits a legislative purpose[17] that has as its object invidious discrimination against a religious denomination or a particular religious practice.[18]

[17] A "purpose" inquiry is the first prong of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

The matter of religion is twice addressed in the First Amendment, initially in the Establishment Clause and then in the Free Exercise Clause. Cardinal rules of construction, as well as common sense, dictate that the text of the two clauses be construed and applied so as not to contradict one another. Indeed, the two provisions are often mutually reinforcing, each Religion Clause pointing in its own way toward the ultimate goal of religious liberty.

Should a government enact a law compelling all citizens (upon pain of misdemeanor for noncompliance) to attend weekly a Roman Catholic Mass, the law would be violative of *both* Religion Clauses: the Establishment Clause because the legislation tends to "establish" the Roman Church, and the Free Exercise Clause because coerced attendance would violate the conscience of many.

As a second illustration—one closer to this case—consider a law whereby persons holding membership in the Episcopalian Church are required to pay an additional tax of $1000 per dependent when filing their annual income tax return. The law is coercive as to the religious practice of church affiliation, thus contrary to the Free Exercise Clause. The tax also violates the Establishment Clause because it has the purpose of discriminating against a particular denomination.

This "overlap" in the prohibitions of the Establishment and Free Exercise Clauses is not indicative of "confusion" or "conflict" or "tension" between the Religion Clauses, but is a proper

[18] *See* M. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 144 (1992) ("[A]bandoning the purpose prong would be an overreaction. . . . Purpose is a necessary backstop to facial neutrality. Facially neutral categories drawn by a law may be pretextual. . . .")

recognition that in certain instances BOTH provisions are violated.[19]

The "overlap" has been noted in this Court quite often, implicitly as well as explicitly. For example, several of this Court's cases state that legislation which intentionally targets a religious practice or a religious denomination is unconstitutional. In *Employment Division v. Smith*, 494 U.S. at 877, the Court said: "The government may not compel affirmation of religious belief . . . punish the expression of religious doctrines it believes to be false . . . impose special disabilities on the basis of religious views or religious status . . . or lend its power to one or the other side in controversies over religious authority or dogma . . . ." In support of this statement the Court cited cases that relied in whole or in part on the Establishment Clause. *Torcaso v. Watkins*, 367 U.S. 488 (1961) (religious oath for assuming public office), relied upon discussions of church-state separation and Establishment Clause cases, as well as individual free exercise. In *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion) (law preventing "ministers" from holding public office), the Tennessee law was said to be violative of both Religion Clauses. *Id.* at 636-642 (Brennan, J., concurring). *Larson v. Valente*, 456 U.S. 228 (1982) (charitable solicitation regulation), held that discrimination among religions or denominations violates the Establishment Clause.[20] As to the string of

[19] This is not unlike the situation in *Widmar v. Vincent*, 454 U.S. 263 (1981), where this Court suggested that a state university regulation violated both the Free Speech and Free Exercise Clauses. "[T]he state interest here . . . is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." *Id.* at 276.

[20] *See also Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (discriminatory denial of permit to Jehovah's Witnesses to hold services in public park is preferring some religious groups over others); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (discriminatory denial of permit to Jehovah's Witness to use city park for public gathering denied "equal protection of the laws, in the exercise of those freedoms of speech and religion"); *cf. Jimmy*

citations in *Smith* to intrachurch dispute cases, an examination of that line of authority reveals that the Court is careful to ground those holdings in both Religion Clauses, *i.e.*, a generalized notion of "First Amendment religious liberty."

The Court in *Smith*, 494 U.S. at 878, went on to poise a tax hypothetical similar to the example above of the $1000 church membership tax. *Smith* said that if "the object of the tax" was "prohibiting the exercise of religion," then the "First Amendment [has] been offended."[21] By the word "object" presumably the Court meant the objective purpose of the lawmaker.[22]

Because of the difficulty in determining the true motives of a group of lawmakers - as distinguished from their objective purpose - for enacting a statute or promulgating a particular policy, the Court has avoided making motive-analysis part of

Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 385-392 (1990) (explaining prior cases as requiring that no flat license tax may operate as a prior restraint on religion, nor may religious activity be singled out for burdensome tax treatment).

[21] This Court's entire passage reads as follows:

> It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Smith, 494 U.S. at 878.

[22] Justice Scalia usefully distinguished "objective purpose" from "motive" in *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

the legal doctrine in most areas of constitutional law.[23] With the Establishment Clause, while not abandoning motive-analysis altogether, the Court has adopted a deferential inquiry into whether the "purpose" was secular or religious. When no unconstitutional purpose appears either on the face of the challenged statute, or in its official legislative history, this Court has been inclined to announce the first element of the *Lemon* test satisfied and move quickly on to the "effect" and "entanglement" prongs.[24] This Court has, in most cases, found a permissible or impermissible purpose in a statute's language simply by exercising common sense.[25]

Justice O'Connor's discussion in *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985), explains the methodology for courts to follow in deferring to a legislative act that is arguably unconstitutional in purpose. Justice O'Connor stated:

> Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

[23] *See, e.g., Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purpose are a hazardous matter."); *cf. Rogers v. Lodge*, 458 U.S. 613 (1982) (at-large voting system maintained for racially discriminatory purpose).

[24] *See Mueller v. Allen*, 463 U.S. 388, 394-95 (1983), where, concerning the deferential application of the "purpose" prong in *Lemon*, the Court said: "This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."

[25] *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 58 (1985); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curiam*); *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968); *Abington School District v. Schempp*, 374 U.S. 203, 224 (1963); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962).

Two of the ordinances expressly target a religious practice, a third ordinance as interpreted by the Attorney General is discriminatory as well, and all four ordinances were passed in a religiously hostile environment. *See* footnote 5 *supra* and accompanying text.

Using the three criteria suggested from *Wallace v. Jaffree* for ascertaining the lawmaker's purpose: the text of the ordinances, the definitive interpretation by the Attorney General opinion, and the religiously hostile environment, unmistakably point to a purpose which was invidious or discriminatory toward the Church of the Lukumi Babalu Aye, Inc., and its religious practice of animal sacrifice.[26]

It cannot be gainsaid that the Petitioners' religious liberty is protected by more than the Free Exercise Clause. The Establishment Clause also prohibits the City of Hialeah from enforcing these ordinances which have as their *object* inhibiting the practice of animal sacrifice as conducted by the Church of the Lukumi Babalu Aye, Inc.

CONCLUSION

Amicus requests that this Court reverse the judgment below on the basis that the ordinances had an invidious discriminatory purpose violative of both the Free Exercise and Establishment Clauses.

[26] The second and third prongs of the Supreme Court's three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), acknowledges that the Establishment Clause may play a role in preventing government from harming a religious group. "[A] statute's principle or primary effect must be one that neither advances *nor inhibits* religion" and "must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-613. Likewise, the alternative "endorsement test" when first suggested by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), prohibited not only government "endorsement" but also official "disapproval" of religious practices or groups.

In the alternative, *Amicus* requests that this Court specifically set aside the conclusion of law that the City had compelling reasons for its ordinances. Then the case should be remanded with directions to hold a new trial (or reopen the judgment and receive further evidence). At the new trial, the District Court should be directed to: (a) properly apply the "compelling interest, least restrictive means" standard, thereby (b) placing the burden of producing evidence on the City for showing that actual harm has occurred or will occur to society should its ordinances be unenforceable against Petitioners.

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